No. 93-135

In The

Supreme Court of the United States

October Term, 1993

PAUL W. BURGESS,

Petitioner,

v.

DANIEL STERN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITION FOR A WRIT OF CERTIORARI

A. CAMDEN LEWIS
Counsel of Record
MARK W. HARDEE
LEWIS, BABCOCK AND HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

I. Are the Due Process rights of a litigant violated when the trial court has *ex parte* communications before making a decision and when the *ex parte* communications then contribute to the trial court's decision which is contained in an order prepared *ex parte* by the counsel for the opposing party.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Paul W. Burgess, and the Respondents, Daniel Stern, John J. Dempster, d/b/a Daniel Stern and Associates.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
List Of Parties	ii
Table Of Authorities	iv
Opinions Below	1
Statement Of Jurisdiction	2
Constitutional Provision Involved	2
Statement Of The Facts	2
Reasons For Granting The Writ	5
The South Carolina Supreme Court Has Undermined Fundamental Due Process Guarantees By Refusing To Vacate An Order Which Was Drafted *Ex Parte* And Which Was The Result Of Extensive *Ex Parte* Communications Between The Trial Judge And The Counsel Of One Party	5
Conclusion	17

TABLE OF AUTHORITIES

Page

CASES:

Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661 (4th Cir. 1989) 15

Anderson v. Bessemer City, 470 U.S. 564 (1985) 15

Armstrong v. Manzo, 380 U.S. 545 (1965) 13

Burgess v. Stern, 428 S.E.2d 880 (S.C. 1993) 2, 9

Connally v. Georgia, 429 U.S. 245 (1977) 11

D'Acquisto v. Washington, 640 F.Supp. 594 (N.D.Ill. 1986) 14

Gibson v. Berryhill, 411 U.S. 564 (1973) 11

Guenther v. C.I.R., 939 F.2d 758 (9th Cir. 1991) 13

Herring v. Retail Credit Co., 224 S.E.2d 663 (S.C. 1976) 13

In Re Wisconsin Steel Corp., 48 B.R. (D.C. 1985) 12

Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) 11

Marshall v. Jerrico, 446 U.S. 238 (1980) 11

Matthews v. Eldridge, 424 U.S. 319 (1976) 11

Morrissey v. Brewer, 408 U.S. 471 (1972) 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 13

Offut v. United States, 348 U.S. 11 (1954) 11

Reading v. Ball, 354 S.E.2d 397 (Ct.App. 1987) 13

St. Luke Evangelical Lutheran Church, Inc. v. Smith, 318 Md. 337, 586 A.2d 35 (1990) 7

TABLE OF AUTHORITIES – Continued

Page

Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed.Cir. 1983) 12

Taylor v. Hayes, 418 U.S. 488 (1974) 11

United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 15

United States v. El Paso Natural Gas Company, 376 U.S. 651 (1964) 15

United States v. United States Gypsum Co., 438 U.S. 463 (1978) 12

Vitarelli v. Seaton, 359 U.S. 535 (1959) 12

STATUTE:

28 U.S.C. § 1257(a) 2

RULE:

Canon 3(A)4, Rule 401, Code of Judicial Conduct, SCACR 13

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

PAUL W. BURGESS,

Petitioner,

v.

DANIEL STERN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Paul W. Burgess respectfully prays that a writ of certiorari issue to review the April 5, 1993 judgement and opinion of the South Carolina Supreme Court, and the May 4, 1993 denial of his Petition for Rehearing in the above captioned Proceeding.

OPINIONS BELOW

The opinion and judgement of the South Carolina Supreme Court dated April 5, 1993, is reported at 428

S.E.2d 880 (S.C. 1993) and is reprinted in the appendix hereto, at App. 1 *infra*.

The South Carolina Supreme Court's denial of Petitioner's Petition for Rehearing dated May 4, 1993, has not yet been reported, and is reprinted in the appendix, at App. 48, *infra*.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgement of the South Carolina Supreme Court of April 5, 1993. Petitioner's subsequent Petition for Rehearing was denied on May 4, 1993. The Supreme Court has jurisdiction to review cases from the state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part that "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF FACTS

This case began as a complaint by the Petitioner against the Respondents Stern and Demster for a specific performance on a contract to purchase real estate. The respondents counterclaimed for slander of title. The case was referred to Special Circuit Judge for the Court of

Common Pleas for Beaufort County, South Carolina – The Honorable Thomas Kemmerlin, Jr.

The case came to trial in March, 1990 as a non-jury matter. Judge Kemmerlin took the matter under advisement *without rendering a decision*. The petitioner had no contact or communication with Judge Kemmerlin until August, 1990 when Judge Kemmerlin issued an order (prepared *ex parte* by respondent's counsel and signed in toto) finding for the respondents on both the claim and counterclaim (Appendix #2, at App. 10). Judge Kemmerlin's order of August 28, 1990 awarded damages in the amount of $62,133.23 and left the damages issue open regarding the matters of attorney's fees and punitive damages. A motion to reconsider was filed by the petitioner, which was denied.

During the pendancy of this matter, the trial attorney for the respondents provided to the petitioner his timesheets in an effort to address the issue of attorneys fees. These timesheets (Appendix #5, at App. 50) reflect seven *ex parte* communications between attorney for the respondents and Judge Kemmerlin between the March trial date and the August 28, 1993 *ex parte* order (Appendix #2, at App. 10).

Included in the description of activity in the timesheets is a reference to a "Maryland opinion" regarding attorney's fees and punitive damages which was given to Judge Kemmerlin during one of the 7 *ex parte* conferences. Judge Kemmerlin's order of August 28, 1990 awards attorneys fees and punitive damages to the respondents based on the "Maryland opinion" given the Judge *ex parte* by the respondent's attorney.

An affidavit submitted by Barry L. Johnson, the respondent's trial attorney, dated March 28, 1991, states that during the *ex parte* communications with Judge Kemmerlin the Judge had:

> Pretty well made up his mind to deny and dismiss the case-in-chief of Mr. Burgess, but he reserved the right to change his mind, and in addition, he was not certain how he was going to rule on the defendant's counterclaims. . . . (Appendix #6, at App. 54).

It was after the *ex parte* communication and through the *ex parte* order that the Respondent won his counterclaims.

Upon discovery of the *ex parte* communications, the petitioner moved in February, 1991, to have Judge Kemmerlin recuse himself from hearing any further matters regarding this case, to reopen the case based on the improper *ex parte* communications, and to have the respondent's attorney disqualified. The respondent's attorney voluntarily withdrew. Judge Kemmerlin issued an order dated September 5, 1991 (Appendix #3, at App. 39) denying the petitioner's motions to recuse himself and reopen the case. In this order the trial judge admits that he participated in improper *ex parte* communications with the respondent's counsel.

Petitioner then brought an appeal before the South Carolina Supreme Court seeking a review of the September 5, 1991, order claiming that he was denied due process, mandated by the 14th Amendment to the U.S. Constitution, due to the improper *ex parte* communications regarding matters which were the basis of the court's decision.

The South Carolina Supreme Court affirmed Judge Kemmerlin's order in its opinion filed April 5, 1993 (Appendix #1, at App. 1). Petitioner moved for a rehearing which was denied by the South Carolina Supreme Court on May 4, 1993 (Appendix #4, at App. 48).

Petitioner now moves before this honorable Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THE SOUTH CAROLINA SUPREME COURT HAS UNDERMINED FUNDAMENTAL DUE PROCESS GUARANTEES BY REFUSING TO VACATE AN ORDER WHICH WAS DRAFTED *EX PARTE* AND WHICH WAS THE RESULT OF EXTENSIVE *EX PARTE* COMMUNICATIONS BETWEEN THE TRIAL JUDGE AND THE COUNSEL OF ONE PARTY.

The judicial system is the one branch of government that is founded on fundamental fairness and unbiased decision makers whose judgements are made upon the presentations made in open court on a level playing field. The decision of the South Carolina Supreme Court brings *ex parte* communications in the judicial arena to a new level of acceptance. No harm, no foul. The determination of whether there has been harm from the *ex parte* communications, according to the South Carolina Supreme Court, is to be made by the very person who participated in them and the very person who has a direct interest in upholding his or her own decision.

This petition invites the Court to revisit the issue of *ex parte* communications and their impact on due process.

This Petition provides two compelling justifications for the issuance of the Writ. First, the South Carolina Supreme Court has refused to follow the directives of this Court concerning the *ex parte* drafting of judicial orders. Second, the South Carolina Supreme Court, by refusing to recognize that *ex parte* communications between the trial judge and counsel were by definition prejudicial, denied Petitioner a fair and impartial trial. The issue of the due process concerns of *ex parte* communications between the trial judge and the counsel of one party is one of first impression. Thus, this Petition presents two distinctive and compelling reasons for the issuance of the Writ.

In this case, there were seven separate *ex parte* contacts between the opposing counsel and the trial judge. (see Timesheets of B.L. Johnson, reprinted at App. 50). The opposing counsel drafted the order for the ultimate decision of the trial court. This order was signed, in toto, by the trial court on August 13, 1990. The timesheets for the opposing counsel showed the following on March 20, 1990, a full four and a half months before the decision of the trial court:

> MAR 20 90 Obtained and studied copy of Md. opinion filed 1/16/90 on attorneys fees/punitive damages; traveled to Beaufort and obtained transcript of trial from Judge Kemmerlin and gave him Md. opinion; 3/19/90 returned call to Judge Kemmerlin redrafting of order in case (travel pro-rated).

(*see* Timesheets of B.L. Johnson, opposing counsel, reprinted at App. 50. This "Maryland opinion" appeared

at two separate places in the trial court's order. The "Maryland opinion" was used as follows:

> 28. I conclude and hold that where, as here, punitive damages are appropriate, the amount of recoverable attorney's fees in the pending litigation may be considered, *St. Luke Evangelical Lutheran Church, Inc. v. Smith,* 318 Md. 337, 586 A.2d 35 (1990), under the "punishment rational" to punish wrongful conduct, where a party has acted in bad faith, vexatiously, wantonly or oppressively, rather than under any concept of mere "compensatory damage." *Id.*[1]

(Order of Judge T. Kemmerlin, Master-in-Equity, August 13, 1990 reprinted at App. 10).[2] Thus, the opposing

---

[1] "The highest courts of seventeen states have considered whether to permit a jury calculating an award of punitive damages to take into account the amount of reasonable attorney's fees incurred in the pending litigation. . . . Thus, the majority of states to consider the issue, permit the jury to take into account the amount of reasonable attorney's fees incurred in the pending litigation when calculating a punitive damage award." *St. Luke Evangelical Lutheran Church, Inc. v. Smith, Id.*

[2] The "Maryland opinion" referred to in the counsel's timesheets is in fact *St. Luke Evangelical Lutheran Church, Inc. v. Smith,* 318 Md. 337, 586 A.2d 35 (1990). This case was the only opinion cited from Maryland in the order of August 13, 1990 and the counsel's timesheets of March 19, 1990 has an entry which reads:

MAR 19 90 Directed M. Lund in computer-assisted legal research re: copy of 1990 Md. Ct./ Appeal Case, *St. Luke Evangelical Lutheran Church Inc. v. Smith,* on relationship of attorney fees to punitive

counsel researched an issue of law which he put into the final order. The judge used the "Maryland opinion" twice in his order of August 13, 1990 and then when the trial judge was moved to recuse himself and set aside his prior orders for initiating and considering *ex parte* contacts with the opposing counsel, the trial judge claimed to have not been influenced by the *ex parte* contacts, nor did he remember being given the "Maryland opinion" even though it showed up twice in his order of August 13, 1990. (App. 10)

The South Carolina Supreme Court recognized and condemned *ex parte* communications between the trial judge and counsel. However, the South Carolina Supreme Court went on to conclude that:

> Judge Kemmerlin was candid in his admission to *ex parte* contacts with respondents' counsel concerning preparation of the order *owing to his ignorance that such was prohibited.* We are cognizant of the extensive deliberation accorded the issues by the trial court. This court takes note of the existence of evidence supporting the finding that no contract existed between the appellant and the respondents. Further, *respondents' nominal recovery for punitive damages* and *the fact that the amount of the attorney's fees and costs were arrived at by stipulation confirms the validity of the judgment in this case.* Respondents' counsel avers furnishing Judge Kemmerlin a copy of a "Maryland Case" relating to punitive damages and/or attorneys fees. *On the grounds that he had no*

---

damages in a defamation action; drafted and prepared letter to Judge Kemmerlin re: same
(see Timesheets of B.L. Johnson, reprinted at App. 50)

> *independent recollection of receiving it,* ***Judge Kemmerlin disavows any impact of the "Maryland Case" on his decision.*** Impliedly, the trial court's rulings are buttressed by the fact that, prior to a final resolution of this case by appeal, *the appellant's complaint seeking judgment against his counsel asserts that the actions giving rise to respondents' judgment resulted from a breach of duty, negligence, and malpractice on the part of Attorney Clabaugh.*

(emphasis added) *Burgess v. Stern,* 428 S.E.2d 880 at 883 (S.C. 1993) (reprinted at App. 1). On its face, the decision of the South Carolina Supreme Court violates the fundamental due process rights of the litigant and is an example of blank judicial utterings with no factual or logical basis.

First, the South Carolina Supreme Court excuses the judge's actions because he was ignorant of the law. Ignorance of the law has never been, and should not now be a defense for wrongdoing. Next, the South Carolina Supreme Court relies on the statements of the trial court that the "Maryland opinion" had no impact on its decision. (Order by Judge Kemmerlin, refusing to recuse himself reprinted at App. 39.) The "Maryland opinion" was cited twice in the trial court's order of August 13, 1990. The "Maryland opinion" was the *sole* basis for allowing the consideration of attorney's fees when calculating punitive damages. Therefore, the statement that the "Maryland opinion" had no impact on the trial court's decision is either simply untrue or the trial judge did not read the order he signed which was prepared *ex parte* by the opposing counsel. Either one of these possibilities violates the due process rights of the litigant.

Further, the fact that the court relies on the fact that the amount of attorney's fees was stipulated by the parties buttresses the finding of the trial court is illogical. Stipulations are intended to increase courtroom efficiency and they have no probative value on the issue of liability whatsoever. The South Carolina Supreme Court's reliance on this fact has given a system wide incentive for litigants not to stipulate to any issue due to their possible probative value on other issues.

Last, the court's reliance on the fact that the litigant was suing his former counsel is equally insipid. This complaint was dismissed as premature without prejudice by a supplemental order dated September 6, 1991, because it was not yet ripe for adjudication. The decision to use other suits filed as probative value for the issues of the *ex parte* communications acts to discourage those transgressed from seeking their entitled legal redress through the court systems of South Carolina and is yet another violation of due process. Each of the above reasons is an admonishable infringement on the litigant's fundamental right to due process.

In addition to the compelling errors in logic and reality, the South Carolina Supreme Court committed Constitutional error for two reasons. First, the South Carolina Supreme Court erred by not following the extensive jurisprudence of this Court regarding the fundamental right of both criminal and civil litigants to a fair and impartial hearing, in fact and appearance. Second, the South Carolina Supreme Court was erroneous because it failed to uphold the Petitioner's due process right to be heard.

This Court has long recognized that "the due process clause entitled a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico,* 446 U.S. 238 at 243 (1980). This due process requirement of a neutral tribunal "helps to guarantee that life, liberty, or property will not be taken on the basis of a distorted conception of the facts or the law." *Id., citing Matthews v. Eldridge,* 424 U.S. 319 (1976). Further, the mere "appearance of fairness" has been compelling because it generates "the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172 (1951); *see also, Offut v. United States,* 348 U.S. 11 (1954). The requirement of neutrality of the tribunal has been "jealously guarded by this Court." *Marshall,* 446 U.S. at 243.

Indeed, this Court has long invalidated systems which might denigrate the appearance of neutrality in the tribunal.[3] This Court has extended its emphasis on a fair tribunal in appearance and fact to include the overruling of a jury verdict where there was *ex parte* communications

---

[3] For example, this Court "invalidated a system in which justices of the peace were paid for issuance but not for nonissuance of search warrants, *Connally v. Georgia,* 429 U.S. 245 (1977) (per curiam); prohibited the trial of a defendant before a judge who has previously held the defendant in contempt, *Taylor v. Hayes,* 418 U.S. 488 (1974); forbidden a state administrative board consisting of optometrists in private practice from hearing charges filed against licensed optometrists competing with board members, *Gibson v. Berryhill,* 411 U.S. 564 (1973); and prohibited a parole officer from making the determination whether reasonable grounds exists for the revocation of parole, *Morrissey v. Brewer,* 408 U.S. 471 (1972)." *Marshall v. Jerrico,* 446 U.S. 238 at 243 n.2 (1980).

between the trial court and the jury foreman even though there was no showing that the communications were prejudicial. *United States v. United States Gypsum Co.*, 438 U.S. 463 (1978). *Ex parte* communications between a party and the decision maker in the employment context have also been condemned. *Vitarelli v. Seaton*, 359 U.S. 535 (1959). *See also, Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed.Cir. 1983).[4]

Ex parte communications between the trial court and counsel have been recognized as a bane to the appearance of tribunal neutrality in the District Courts.

> It is rarely possible to prove to the satisfaction of the party excluded from the communications that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations. This is why the prohibition is not against "prejudicial" ex parte communications, but against ex parte communications.

In Re Wisconsin Steel Corp., 48 B.R. 753 (D.C. 1985) (*see* unreported Judicial Determination concerning the guilty judge in *Re Wisconsin Steel*, reprinted at App. 57, *infra*). Furthermore, the Ninth Circuit stated that "only in light

---

[4] In *Sullivan*, the Federal Circuit Court of Appeals stated that "It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such an activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it." *Sullivan*, at 1271.

of a compelling justification would *ex parte* communications be tolerated." *Guenther v. C.I.R.*, 939 F.2d 758 (9th Cir. 1991).

South Carolina has condemned *ex parte* communications. "A Judge should . . . , except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending matter." Canon 3(A)4, Rule 401, Code of Judicial Conduct, SCACR. Additionally, the South Carolina Supreme Court has invalidated the signing of an order by a judge when the order was prepared by the counsel of one party. *Herring v. Retail Credit Co.*, 224 S.E.2d 663 (S.C. 1976); *Reading v. Ball*, 354 S.E.2d 397 (Ct.App. 1987). In this case, however, the South Carolina Supreme Court has left the Canons of Judicial Conduct and its prior decisions concerning *ex parte* communications impotent shells of their former selves.

Ex parte communications both impugn the appearance of a fair tribunal as well as jeopardize the substantive fairness of any decision resulting from the communications. The South Carolina Supreme Court, by allowing the *ex parte* communications to stand uncorrected, has allowed a serious due process violation to go uncorrected.

Next, the South Carolina Supreme Court's ruling in the instant case violates Constitutional due process guarantees because it effectively deprives the parties of a chance to be heard. One of the fundamental guarantees of due process is the right to be heard at a "meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 545 at 552 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Ex parte contacts, by definition, do not allow the unincluded party to be heard.[5] In *D'Acquisto v. Washington*, 640 F.Supp. 594 (N.D.Ill. 1986), the Illinois District Court stated that "if the decisionmaker considers charges or evidence which have come to it *ex parte*, i.e. without notice and an opportunity to respond, due process is violated." *Id.*, at 621. *Ex parte* contacts do not allow the unrepresented party to present arguments on its behalf. They can never be refuted if they are not made known to the unincluded side. This lack of a fair hearing as a result of the prohibited contacts creates enough impetus to warrant this Court's attention. Further, *ex parte* contacts can never be conclusively proven to have been non-prejudicial. By their very nature and prohibition, any question as to the prejudicial nature of *ex parte* contacts should be construed in the favor of the party who was not included in these contacts.

The decision of the South Carolina Supreme Court, if allowed to go unreviewed by this Court, will undermine the fundamental guarantees of a neutral tribunal guaranteed by the Constitution. The *ex parte* communications in this case were clearly prohibited by state law. Additionally, *ex parte* communications between the trial judge and the counsel of one party threaten due process imperatives because they adversely affect the fundamental appearance of a tribunal's neutrality.

---

[5] "The prohibition against ex parte communications is rather a function of the general due process principle that the accused should have the notice of the charges and the evidence against him so that he can effectively answer with his own evidence and arguments." *D'Acquisto v. Washington*, 640 F.Supp. 594 at 621 (N.D.Ill. 1986).

Next, this Court has pronounced standards for the review of orders drawn up by the counsel of one party *ex parte*. The South Carolina Supreme Court did not consider the directives of this Court. The controlling case in this area is *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

In *Anderson*, this Court strongly discouraged the use of judicial orders drafted *ex parte* by one of the parties. However, this Court did not vacate the *ex parte* orders because the trial court:

> provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings, and directed the petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's proposed findings.

Id., at 571. *See also, United States v. El Paso Natural Gas Company*, 376 U.S. 651 (1964); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944). Additionally, the Fourth Circuit Court of Appeals has condemned the use of unreviewed and unargued orders which were prepared by the counsel of one of the parties. *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661 (4th Cir. 1989). Thus, for an order and findings drafted *ex parte* to be Constitutionally permissible, this Court requires that the trial court announce its findings in open court, provide the framework for the ultimate document, and give the opposing counsel a meaningful opportunity to respond. None of these criteria were met in the instant case, yet the

South Carolina Supreme Court allowed the decision to go uncorrected.

In the instant case, the record indicates that the *ex parte* communications and order drafted by the opposing counsel occurred four and one-half months *before* the trial court made a decision. The trial court never announced its decision in open court. In fact, there is an affidavit by the counsel who communicated with the trial court which states that the trial court had not made up its mind until after the attorney had provided him with extensive research and assistance. (*see* Affidavit of B.L. Johnson, opposing counsel, reprinted at App. 54). Additionally, no framework for the *ex parte* order was given in other than *ex parte* communications. Further, there was never any opportunity to respond to the order issued by the opposing counsel. All three of the essential criteria which allow an *ex parte* order to withstand a stringent appellate review were not met.

The fact that the South Carolina Supreme Court refused to recognize and follow the pronouncement of this Court is another compelling justification for the issuance of the Writ. The error of the South Carolina Supreme Court demands correction so that the Constitutional mandate of due process will not be undermined.

If this Petition is granted, the Court can pass on two distinct areas of due process jurisprudence. The Court can determine what due process requirements must be met when there are *ex parte* communications between the trial court and the counsel of one party before the decision of the trial court. It may also determine what the standard of review for *ex parte* orders which are drafted

and pronounced without the benefit of an open court announcement of the trial court's decision, without the benefit of the opportunity of opposing counsel's being able to argue the proposed order, and without the benefit of a memorandum setting out the essential findings of the trial court. By granting this petition, the Court will also have the opportunity to correct an unconstitutional decision of the South Carolina Supreme Court.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted and the Court should allow the Petitioner to file his brief and to articulate more comprehensively why the South Carolina Supreme Court failed to uphold essential due process concerns regarding the drafting of *ex parte* orders and significant *ex parte* communications between the trial court and the counsel of one party. If the decision of the South Carolina Supreme Court goes unreviewed, it will seriously undermine the Constitutional mandate of due process, allow the South Carolina Supreme Court to disregard the decisions of this court, and encourage *ex parte* contacts

between the trial court and counsel which will degrade the neutrality of tribunals both in fact and appearance.

Respectfully submitted,

A. Camden Lewis*
Mark W. Hardee
Lewis, Babcock, & Hawkins
1513 Hampton Street
P.O. Box 11208
Columbia, SC 29211
(803) 771-8000

Attorneys for Petitioner
**Counsel of Record*

APPENDIX 1

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Paul W. Burgess, Appellant,

v.

Daniel Stern and John J. Dempster, d/b/a Daniel Stern & Associates, Respondents.

AND

Sea Pines Realty Co., Respondent,

v.

Paul W. Burgess, Appellant,

v.

Frank H. Clabaugh, Respondent.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Master-In-Equity

Opinion No. 23832
Heard June 4, 1992 – Filed April 5, 1993

AFFIRMED

A.Camden Lewis and Mark W. Hardee, both of Lewis, Babcock, & Hawkins, of Columbia, for appellant.

Morris D. Rosen, of Rosen, Rosen & Hagood, of Charleston, for Respondents Daniel Stern and John J. Dempster.

Russell P. Patterson, of Jones, Scheider & Patterson, of Hilton Head, for Respondent Sea Pines Realty Company.

Susan Taylor Wall, of Holmes and Thomson, of Charleston, for Respondent Frank H. Clabaugh.

Finney A.J.: These cases arise from the same facts and involve Appellant Paul W. Burgess' appeal of the trial judge's order denying appellant's motions for the trial judge to 1) recuse himself, 2) vacate his prior orders, and 3) re-open the case, or 4) grant a new trial as a result of ex parte communications between the trial judge and counsel for Respondents Daniel Stern and John J. Dempster, d/b/a Daniel Stern & Associates. We affirm.

The initial action commenced on April 6, 1989 when, for the stated purpose of enforcing an alleged contract of purchase and sale, the appellant filed and had published a notice of lis pendens against real estate owned by the respondents. By complaint dated April 26, 1989, the appellant brought suit against the respondents seeking specific performance on the alleged contract. Respondents answered by qualified general denial and counterclaimed asserting the Statute of Frauds, Slander of Title, and Tortious Interference with a Contract; sought dismissal of appellant's action; discharge of the lis pendens, requested actual and punitive damages, and demanded a jury trial.

The matter was tried March 1-2, 1990, by Special Circuit Court Judge Thomas Kemmerlin, Jr. On August 13, 1990, Judge Kemmerlin issued an order holding that

no contract existed between the appellant and respondents. The judge awarded special damages, attorneys fees and costs to the respondents based upon a finding against the appellant of slander of title and tortious interference with a contract for the sale of the subject real estate between the respondents and a third party, Richard A. English; except that attorney's fees and costs were not awarded for tortious interference with a contract. Based upon English's testimony that he still intended to consummate the sale, the court awarded only interest on the purchase price on the contract between the respondents and English. The order provided that, should English not close the sale within sixty days of the order, the case could be re-opened to determine damages arising therefrom. Judge Kemmerlin stayed appeal rights of the parties pending entry of a final order and judgment after a hearing on August 20, 1990, to determine the amount of attorneys' fees, costs, and punitive damages to be assessed against the appellant.

The hearing set for August 20, 1990, was subsequently rescheduled for August 27, 1990. That hearing was canceled as the result of a stipulation dated August 24, 1990, and filed August 27, 1990, in which the parties, without appellant waiving his right to appeal, stipulated to fees and costs. Judge Kemmerlin's order awarding the respondents attorneys' fees, costs, and $100 in punitive damages was issued August 28, 1990. On November 12, 1990, the judge denied appellant's motion for reconsideration of the August 13, 1990, order.

On November 13, 1990, respondents moved to reopen the damage aspect of the case based upon English's withdrawal of his offer to purchase the subject lot and a

refund of his earnest deposit. The motion was granted January 11, 1991.

On December 11, 1990, the court granted the motion of Attorney Frank H. Clabaugh to withdraw from representation of the appellant.

The second action was instituted against the appellant by Sea Pines Realty Co., listing agent for the respondents, by complaint dated December 20, 1990, alleging the wrongful procurement of a breach of the listing agreement between it and the respondents as well as a breach of the contract of sale between English and the respondents. The appellant asserted a qualified denial in his answer dated February 7, 1991.

On February 8, 1991, the appellant moved to re-open the case, vacate the orders, and for a new trial, contending he had been prejudiced and denied due process of law by virtue of extensive improper ex parte contacts between Judge Kemmerlin and Barry L. Johnson of the firm of Novit, Scarminach & Johnson, P.A., counsel for the respondents, relating to preparation of the August 13, 1990, order. The motion cited ex parte contacts beginning in March of 1990 with a conference and telephone call between respondents' counsel and the judge in which counsel learned that the judge was going to rule in favor of the respondents, and at least one ex parte conference in May of 1990 to discuss the proposed order. The appellant alleged that after drafting portions of the proposed order, respondents' counsel conferred by telephone with Respondent Stern in June of 1990 and thereafter,

redrafted part of the order prior to forwarding the finalized version to Judge Kemmerlin. The appellant contended respondents' counsel subsequently traveled to Beaufort and conferred ex parte with Judge Kemmerlin about the order, and that an additional ex parte conference occurred in July of 1990.

The appellant also filed motions on February 8, 1991, to disqualify Judge Kemmerlin and Barry L. Johnson, counsel for the respondents, upon the grounds of ex parte communications between Judge Kemmerlin and Johnson, Johnson's usurpation of judicial functions, and the fact that Johnson's representation posed a conflict. Grounds cited for the conflict were that appellant's initial counsel had been replaced by William Clark of the firm of Biel and Clark; Clark had gained substantial confidential information about the case and appeared on behalf of the appellant at a hearing in this matter on January 11, 1991; several days thereafter, Johnson joined the firm of Biel and Clark. Clark then ceased to represent the appellant, but Johnson continued as respondents' counsel.

The third action was brought by appellant's complaint of February 18, 1991, against Frank H. Clabaugh, his prior counsel, alleging liability for indemnification and legal malpractice. The appellant sought damages for Clabaugh's alleged breach of duty and negligence in the representation provided appellant in the transaction with the respondents and the ensuing litigation. On March 15, 1991, Clabaugh moved to dismiss appellant's action.

On May 7, 1991, Sea Pines filed a motion to stay its action until resolution of three motions pending in the related cases.

On May 10, 1991, appellant moved to have Judge Kemmerlin disqualify himself in the Sea Pines suit on the grounds of the ex parte communications in the primary case.

On September 5, 1991, Judge Kemmerlin issued an order in which he addressed the motions to re-open the case, vacate the previous orders and grant a new trial; to recuse himself; disqualify Johnson as counsel for respondents; and Sea Pines' motion to stay the proceedings. Judge Kemmerlin admitted having ex parte communications with respondents' counsel concerning drafting of the August 13, 1990, order but stressed the fact that all factual determinations and decisions of the law were made by the court, and declined to recuse himself. The judge refused to vacate the prior orders, denied a new trial, ruled that the motion to disqualify Johnson was moot since Johnson was no longer participating in the case and held that, in effect, the proceedings were stayed during pendency of the motions before the court. The judge set a hearing for September 23, 1991, to consider the remaining motions pending. A supplemental order was issued September 9, 1991, in which the court dismissed as premature the third party complaint against Clabaugh without prejudice to the right to restore.

On appeal, the appellant asserts that, based on the trial court's error in conducting ex parte communications with opposing counsel, 1) appellant was denied a fair and impartial trial; 2) Judge Kemmerlin erred in refusing to recuse himself from further motions; and 3) all orders rendered after the ex parte contacts should be vacated.

South Carolina case law and rule-making authorities are well synchronized on the prohibition against ex parte contacts.[1] In *Herring v. Retail Credit Co.*, 266 S.C. 455, 224 S.E.2d 663 (1976), the judicial practice of merely signing an order prepared by counsel of one party was condemned. This Court advised the Bench and Bar that not only do such orders deprive the reviewing Court of adequate records on appeal, but also deny to the deprived party an opportunity to be heard in matters which affect them. *Id. Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661 (4th Cir. 1989), evinces the Fourth Circuit Court of Appeals' disapproval of ex parte contacts of this type, despite its observation that under an objective view of all the circumstances, it could not be believed that the trial judge in that case was partial.

Canon 3(A)(4), Rule 501, Code of Judicial Conduct, SCACR, states: "A judge should . . . , except as authorized by law, neither initiate or consider ex parte or other communications concerning a pending or impending matter." While Canon 3(A)(4) guards against ex parte indiscretion, it also strives to eliminate the appearance of impropriety. This issue was discussed succinctly in the

---

[1] *See Propriety of a judge requesting one counsel to draft the required order in a particular case; propriety of a judge discussing the order to be drafted with one counsel outside the presence of opposing counsel,* Opin No. 2-1988, Advisory Committee on Standards of Judicial Conduct (Filed January 4, 1988); Rule 34(1)(b)(2), Code of Judicial Conduct, S.Ct., Ct. App. Rule on Judicial Discipline And Standards (now Rule 501, Canon 2(A), Canon 3A(4), Code of Judicial Conduct, SCACR); *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, *reh'g denied* (4th Cir. 1989); *Herring v. Retail Credit Co.*, 266 S.C. 455, 224 S.E.2d 663 (1976); *Reading v. Ball*, 291 S.C. 492, 354 S.E.2d 397 (Ct. App. 1987).

case of *In Re: Wisconsin Steel,* 48 B.R. 752 (D.Ill. 1985). The Court in *Wisconsin Steel* noted:

> It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against "prejudicial" ex parte communications, but against ex parte communications.

Judge Kemmerlin was candid in his admission to ex parte contacts with respondents' counsel concerning preparation of the order owing to his ignorance that such was prohibited. We are cognizant of the extensive deliberation accorded the issues by the trial court. This court takes note of the existence of evidence supporting the finding that no contract existed between the appellant and the respondents. Further, respondents' nominal recovery of punitive damages and the fact that the amount of attorney's fees and costs were arrived at by stipulation confirms the validity of the judgment in this case. Respondents' counsel avers furnishing Judge Kemmerlin a copy of a "Maryland Case" relating to punitive damages and/or attorneys fees. On the grounds that he had no independent recollection of receiving it, Judge Kemmerlin disavows any impact of the "Maryland Case" on his decision. Impliedly, the trial court's rulings are buttressed by the fact that, prior to a final resolution of this case by appeal, the appellant's complaint seeking judgment against his counsel asserts that the actions giving rise to respondents' judgment resulted from a breach

of duty, negligence, and malpractice on the part of Attorney Clabaugh.

An objective view of the record and circumstances surrounding the convoluted proceedings in this case leads to the conclusion that Judge Kemmerlin's order of August 13, 1990, and the ensuing orders are supported by the evidence, and we conclude that no prejudice resulted from the ex parte contacts. While this Court explicitly condemns ex parte communications, we do not adopt, per se, the view that all orders consequentially emanating therefrom in part or in whole are rendered invalid. Under the facts and circumstances existing here and absent a finding of partiality or prejudice in this record, we decline to vacate the orders of the trial court, or to find that recusal of the trial judge was mandated by ex parte communications with defense counsel.

Notwithstanding our ruling in this case, the Bench and Bar are cautioned to strictly observe the Canons governing judicial and attorney conduct with regard to ex parte contacts as they relate to maintaining the appearance of propriety and to comply with both the letter and the spirit of Opinion No. 2-1988 of the Advisory Committee on Standards of Judicial Conduct.

We affirm the judgment and rulings of the trial court in this case.

AFFIRMED.

HARWELL, C.J., CHANDLER, TOAL and MOORE, JJ., concur.

APPENDIX 2

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS CASE No.: 89-CP-07-750
PAUL W. BURGESS, Plaintiff, vs. DANIEL STERN and JOHN J. DEMPSTER, d/b/a DANIEL STERN and ASSOCIATES, Defendants.	)	ORDER

This matter came before me for trial on March 1, 1990 and March 2, 1990 in my Chambers/Courtroom at 1407 King Street in Beaufort, South Carolina. This case is a non-jury matter, in that the Plaintiff seeks specific performance of an alleged contract with the Defendants, for the Plaintiff to purchase and the Defendants to sell, a vacant residential building lot located on Hilton Head Island, in Beaufort County, South Carolina. Counsel for the Plaintiff were Frank H. Clabaugh, Esquire and Stephen E. Carter, Esquire of the firm of Ruth, Clabaugh & Hack, P.A.; Counsel for Defendants was Barry L. Johnson, Esquire of the firm of Novit, Scarminach & Johnson, P.A. Plaintiff alleges that the contract consisted of the Defendants' written offer to sell, orally accepted by Plaintiff. By Stipulation of Counsel and, I believe, the order of reference,

this matter was heard by me with finality and with direct appeal to the Supreme Court of South Carolina.

In addition, in this case, the Defendants' Amended Answer and Counter-Claims present the following: a qualified general denial, wherein Defendants deny the operative allegations of the Complaint; an affirmative defense under the Statute of Frauds; a counter-claim for slander of title, alleged by Defendants to have arisen from the filing by Plaintiff of a Notice of Lis Pendens on the subject property, and the resultant publication thereof to the world-at-large, and to a Mr. Richard English, in particular, and the resulting failure of Defendants to be able to close their sale of the subject property to Mr. English, with whom the Defendants had entered into a written contract to sell the subject property (hereinafter discussed); and a second counter-claim, alleging that the Plaintiff tortiously interfered with the contract between the Defendants and Mr. English, by Plaintiff's Notice of Lis Pendens, precluding Defendants from consummating their contracted-transaction with Mr. English. In connection with the slander of title counter-claim, the Defendants also seek recovery, as special damages, of their attorney's fees and costs. Near the end of the trial, I agreed with counsel that that issue would be reserved for hearing at a later date, should I decide that attorney's fees be awarded.

In the course of the trial, Plaintiff's counsel stipulated that, insofar as the Statute of Frauds was concerned, Plaintiff's case was not predicated on part performance, such as by going into possession and making improvements on the property, etc., and, therefore, I understand

this to be, largely, a memorandum case concerning the Statute of Frauds.

More specifically, in this case, Plaintiff contends that a writing (Plaintiff's Exhibit 14) signed by Defendant Daniel Stern dated March 17, 1989, constituted an offer, binding upon both Defendant Stern and Defendant Dempster, which was orally accepted by Plaintiff several days later, allegedly forming what Plaintiff relies upon as a contract. This requires the Court to determine whether or not this writing, Plaintiff's Exhibit 14, was a sufficient memorandum, under the Statute of Frauds, and generally in contract law, such that its acceptance, either orally or in writing, could make a contract. In addition, since the residential lot in question in this case is owned by the Defendants as tenants-in-common, there is a question of whether or not this writing, signed by Mr. Stern, bound Mr. Dempster, who did not sign it.

Having heard the testimony of the various witnesses, and having observed their demeanor upon the witness stand, and having reviewed all exhibits admitted into evidence in this matter, and having reviewed the materials and arguments submitted by able counsel on both sides, I now make the following:

FINDINGS OF FACT

1. At all times material hereto, the Defendants owned and held title to that certain lot of real property described as Lot A, Block S, Fort Walker Drive, Port Royal Plantation, Hilton Head Island, Beaufort County, South Carolina as tenants-in-common, having acquired this lot in the early 1980's.

2. The Plaintiff is a real estate broker and developer with some fifteen (15) years of experience, professionally, in the real estate field.

3. The Defendants are owners of a company which, for nearly twenty (20) years, has engaged in the business of placing physicians with hospitals, a business in the nature of a physician-search company. Defendant Stern has never sold any real estate, unless it be concluded that he has sold the lot in question here. Defendant Dempster has no demonstrated education, experience or expertise in the real estate field.

4. By the fall of 1988, the Plaintiff had acquired, and was renovating and preparing to inhabit with his family, a large and beautiful home on a lot of land contiguous to the lot owned by Defendants.

5. Defendant Stern met Plaintiff, for the first time, in the fall of 1988. Defendant Stern and Plaintiff, then and there, discussed the interest of Defendant Stern and Defendant Dempster to sell their lot and the interest of Plaintiff to purchase Defendants' lot. Their discussions and communications continued for several months. During this time, and previously, Defendants had listed their lot for sale with various real estate brokers.

6. By the Spring of 1989, the Plaintiff, as well as Mr. Richard English, had emerged as prospective buyers, separately, for Defendants' lot. Plaintiff knew that there was a competing bidder for the lot. So did Mr. English. Indeed, the real estate sales agent who acquainted Mr. English with Defendants' lot described the circumstance as a "bidding war."

7. By a letter dated March 16, 1989, post-scripted March 17, 1989 and telefaxed on March 17, 1989 (Plaintiff's Exhibit 12) by and from Plaintiff to Defendants, Plaintiff outlined the basic elements of his offer for the purchase of Defendants' lot.

8. There is no memorandum or note, in writing and signed by either Defendant, or some person thereunto by either or both of them lawfully authorized, which accepts the Plaintiff's telefaxed offer of March 17, 1989 (Plaintiff's Exhibit 12).

9. On March 16, 1989, Defendant Stern drafted a letter, in his handwriting, addressed to the Plaintiff. This letter was typed by Defendant Stern's secretary on March 17, 1989 (Plaintiff's Exhibit 14), and, on that date, telefaxed to Plaintiff. It was not prepared, or sent to Plaintiff, in response to Plaintiff's letter telefaxed on March 17, 1989 (Plaintiff's Exhibit 12), nor was Plaintiff's Exhibit 12 available to, or used by Defendant Stern in drafting Plaintiff's Exhibit 14.

10. Plaintiff's Exhibit 14 does not set forth an offer, susceptible of acceptance to make a binding contract, on behalf of Defendants Stern and Dempster for the sale of their lot to Plaintiff, or to anyone. It does not contain all of the material elements of an offer. It expressly indicates that it was not authorized by Defendant Dempster. It is merely, in fact, an invitation by Defendant Stern for Further discussions and negotiations with Mr. Dempster, within the minimum parameters described therein.

11. On March 24, 1989, Plaintiff caused a photocopy of a so-called "binder check" to be telefaxed to

Defendants' office. It was unaccompanied by any documents. The original was received by Witness Franks, broker-in-charge of Sea Pines Real Estate Company, listing agent for the subject property, around 8:00 a.m. on Saturday, March 15, 1989. This so-called "binder check," despite Plaintiff's contention to the contrary, did not bind Defendants to anything.

12. On March 24, 1989, the Defendants entered into a written contract with Mr. Richard English for the sale and purchase of Defendants' lot (Defendants' Exhibits 1, 2 and Plaintiff's Exhibit 37). The purchase price stated in the contract is Three Hundred Eighty-Five Thousand ($385,000.00) Dollars, plus a four percent (4%) interest to Defendants as limited partners in a shopping center partnership with a guaranteed minimum value of Twenty-Eight Thousand ($28,000.00) Dollars, making the total purchase price Four Hundred Thirteen Thousand ($413,000.00) Dollars. This contract required Defendants, at closing, to deliver marketable and fee simple title, with covenants of general warranty. Under the terms of this contract, closing was scheduled to occur on June 1, 1989.

13. On April 6, 1989, Plaintiff, by and through his attorney and agent, Frank H. Clabaugh, filed of record in the Beaufort County Courthouse, a Notice of Lis Pendens dated April 5, 1989, against Defendants' lot for the stated purpose of enforcing a contract for the purchase and sale of certain real property. This Notice of Lis Pendens was delivered to Defendants' then real estate broker, Sea Pines Real Estate Company, by Mr. Clabaugh's letter of April 14, 1989, wherein he stated: "As I believe you (sic) aware, it is out (sic) client's position that he had a contract for the purchase of that property, which Messrs.

Sterns (sic) and Dempster abrogated in favor of a new contract with Mr. English." By means of the filing, of public record, of the Notice of Lis Pendens, publication thereof was constructively given to the world and actual notice thereof reached Mr. English.

14. The contracted-transaction between Defendants and Mr. English did not close when scheduled on June 1, 1989 and had not closed as of the time of the trial of this case. It did not close because Plaintiff's Notice of Lis Pendens created a cloud on the Defendants' title, precluding their ability to convey their lot to Mr. English in fee-simple, with marketable title. Thus, Defendants breached their contract with Mr. English.

15. At least as of the time of his deposition testimony, taken February 21, 1990 and entered as Court Exhibit 2 at the trial of this case, Mr. English, nevertheless, remained an interested prospective purchaser of Defendants' lot. Accordingly, Defendants have lost, at least, the use of the purchase price of Four Hundred and Thirteen Thousand ($413,000.00) Dollars from and after the closing date of June 1, 1990. The contract price due from English to the Defendants was demandable on June 1, 1989 and, but for the action of the Plaintiff, would have been paid. The contract price in the English-Stern/Dempster contract is a price certain or capable of being reduced to a price certain. Further, Defendants have been forced to employ attorneys to defend themselves in the lawsuit and to discharge Plaintiff's Notice of Lis Pendens initiated by Plaintiff, incurring attorneys' fees and costs in amounts not yet determined. Further, Defendants have incurred costs of Six Hundred ($600.00) Dollars in air travel for their depositions; and Fifty ($50.00) Dollars for

the hotel for their depositions; and for the trial they have incurred Four Hundred Four ($404.00) Dollars in travel costs; and Three Hundred ($300.00) Dollars for hotel rooms. In addition, due to the Plaintiff's Notice of Lis Pendens, and Defendants' resultant inability to close their sale to Mr. English, Defendants have been forced to carry the costs of continued ownership of their lot for at least one (1) year, at the annual rate of, at least, Four Thousand Four Hundred ($4,400.00) Dollars for annual Beaufort County *ad valorem* taxes and an additional Four Hundred Ninety-Seven ($497.00) Dollars in annual Port Royal regime fees.

16. On March 24, 1989, after receiving a message from Defendant Stern that he and Defendant Dempster were going ahead with a contract with another party (Apparently Mr. English), nevertheless, Plaintiff, by telefax, submitted a cover letter dated March 24, 1989 and a written offer to purchase Defendants' lot. These, together, constitute Plaintiff's Exhibit 21. Plaintiff contends that Plaintiff's Exhibit 21 and Plaintiff's Exhibit 14 are exactly what he contends he orally agreed to with Defendants. In fact, there are numerous, material differences between Plaintiff's Exhibit 14 and Plaintiff's Exhibit 21, not the least of which is that, in Plaintiff's Exhibit 21, there is an exculpation paragraph which provides, in substance, that Plaintiff would have no personal liability to Defendants for the Three Hundred Fifty-One Thousand ($351,000.00) Dollar balance on the promissory note under his proposal. Thus, clearly, if Plaintiff's Exhibit 14 is construed to have been an offer, susceptible of acceptance to make a binding contract, which, as stated, I find it not to have been, the acceptance expressed by Plaintiff was only as to

those terms and conditions which are set forth in Plaintiff's Exhibit 21. No writing exists signed by either Defendant incorporating the terms and conditions set forth in Plaintiff's Exhibit 21.

17. Plaintiff's statement, as set forth in his Notice of Lis Pendens, to the effect that he held a contract for the purchase and sale of Defendants' lot is, and was on April 6, 1989, and since then, false and untrue, in that Defendants had not then entered into any contract with Plaintiff for the purchase and sale of the lot and Plaintiff has, and had on April 6, 1989, absolutely no right to claim any interest in the title to Defendants' lot.

18. On March 27, 1989, Mr. English, along with Sea Pines Real Estate Company real estate sales agents Wilkinson and Stulac, and an engineer, Mr. Parsons, visited Defendants' lot. Mr. Parsons visited Defendants' lot for the purpose of staking the septic tank percolation field and other survey matters. Then and there, they all encountered the Plaintiff. The Plaintiff said to Mr. English words to the following effect: "I understand you're under contract. I respect that you have a fully legal, enforceable contract, and you have the property, but there's a better way to skin this cat." I find that Plaintiff has not denied making that statement. In testimony, Mr. Burgess explained that what he meant by, "there's a better way to skin this cat," is that there is another lot contiguous to the Defendants' lot, which the Plaintiff proposed that the Plaintiff and Mr. English buy, with Mr. English utilizing this third lot to build his home, and Plaintiff and Mr. English splitting, and thereby sharing, the middle lot, which is Defendants' lot. On the basis of this, I find that, at the time Plaintiff published his Notice of Lis Pendens

on April 6, 1989, he knew that the statements in the Notice of Lis Pendens were false and that he demonstrated a reckless disregard for the truth of his statement, in his Notice of Lis Pendens, to the effect that he had a contract to buy Defendants' lot.

19. I find that Plaintiff intentionally published the false statement in his Notice of Lis Pendens, because he knew that it would impede or prevent Defendants' sale of this lot to Mr. English.

20. On April 6, 1989 at a hotel at Hilton Head Island, Plaintiff approached, and talked separately, to witness Stulac and to witness Franks. Witness Franks was the broker-in-charge of Sea Pines Real Estate Company and witness Stulac, as indicated, was a real estate sales agent for Sea Pines Real Estate Company. Despite having there discussed with witness Stulac that, in their real estate education, they learned that verbal contracts were not enforceable, Plaintiff told Stulac words to the effect that he would file suit and, if necessary, appeal the decisions and, in effect, tie up the Defendants' for one to one and one-half years for appeals. Based on this evidence, I find that Plaintiff published his Notice of Lis Pendens intentionally, deliberately, oppressively, maliciously and with the intent to injure, vex and/or annoy the Defendants and Mr. English.

21. Now, there is testimony in the record that at some point Plaintiff consulted lawyers. He did not bring those lawyers to testify at trial. Surely, Plaintiff had control of his lawyers to get them to trial to testify. While those lawyers' testimony as to what advice, if any, they gave to Plaintiff could not have been admitted for the

purpose of proving or disproving the ultimate truth of the question of whether there was or was not a contract between Plaintiff and Defendants Stern and Dempster, nevertheless, the testimony of those lawyers as to their conversations with Plaintiff could certainly been admitted for the purpose of showing the state of mind out of which Plaintiff operated when he elected to have Mr. Clabaugh file the Notice of Lis Pendens and proceed with the litigation in this matter. (There is no showing that Mr. Clabaugh's firm provided the advice, if to Plaintiff upon which he acted.)

22. As a direct and proximate result of Plaintiff's conduct in filing and publishing the Notice of Lis Pendens, Defendants' title to their lot has been disparaged and slandered and there exists a cloud on the title to their property, impairing its marketability and vendibility, and preventing Defendants from having been able, in a timely manner, to have conveyed marketable and fee simple title to their lot to Mr. English as contracted, and causing special damages to Defendants from the loss of their scheduled and contracted June 1, 1989 sale to Mr. English of, at least, lost interest on the purchase price of four Hundred Thirteen thousand ($413,000.00) Dollars, the continued ownership costs and litigation costs and attorneys' fees, as described in Findings of Fact 15.

23. Plaintiff knew by the end of the day on March 24, 1989 of the existence of the Defendants' contract with Mr. English and he acknowledged that to Mr. English and others, as stated in Finding of Fact 18, on March 27, 1989.

24. By filing his Notice of Lis Pendens, on April 6, 1989, against the subject property, Plaintiff intentionally

and proximately caused Defendants' to breach their contract with Mr. English by preventing Defendants from timely delivering the quality of title required by their contract with Mr. English.

25. Plaintiff's action in filing a Notice of Lis Pendens was not justified in that Plaintiff knew and, at least on March 27, 1989, respected that Mr. English had a fully legal and enforceable contract to purchase Defendants' lot and that, in effect, Mr. English had the property and not Plaintiff, especially in view of the light of Plaintiff's fifteen (15) years of professional experience of real estate broker and developer. Thus, I find that Plaintiff acted maliciously, from improper motives, and with no reasonable belief in the efficacy of his claim; indeed, as of March 27, 1989, he expressed *disbelief* in the efficacy of his claim!

26. As a direct and proximate result of Plaintiff's conduct, tortiously interfering with Defendants' contract with Mr. English, Defendants have suffered actual, special and/or consequential damages, at least in the form of loss of interest on the purchase price of Mr. English's contract since June 1, 1990, said purchase price being Four Hundred and Thirteen Thousand ($413,000.00) Dollars and the carrying costs of continued ownership of the property as described in Finding of Fact 14.

27. Under the terms of the English-Stern/Dempster Contract (Defendants' Exhibits 1, 2 and Plaintiff's Exhibit 37), Three Hundred, Forty-One Thousand Five Hundred ($341,500.00) Dollars of the contracted purchase price was to have borne interest from closing on June 1, 1989 at ten and one-half (10½) per-cent per annum.

CONCLUSIONS OF LAW

1. Any findings of fact, set forth above, which may be Conclusions of Law, are hereby adopted as such, as if repeated herein.

2. A contract is ordinarily formed by an offer and an acceptance. In order to constitute a proposal which may be converted into a contract by acceptance, an offer must be definite. Care should be taken not to construe as offers letters which are intended merely as preliminary negotiations. The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all of the terms which the parties intend to introduce and material terms cannot be left for future settlement. *McLaurin v. Hamer,* 165 S.C. 411, 164 S.E. 2, 5 (1932); *Hyde v Cooper,* 13 Rich Eq. Cas. 251, 257 (1867); *Boozer v. Teague,* 27 S.C. 348, 2 S.E. 551, 555 (1887); *Aperm of South Carolina v Roof,* 290 SC 442, 351 S.E.2d 171, 173 (S.C. App., 1986).

3. I conclude that Defendant Stern's letter of March 17, 1989 (Plaintiff's Exhibit 14) to Plaintiff did not constitute a proposal sufficiently definite to be capable of conversion into a contract by acceptance; it was merely an invitation to discuss and negotiate. *Id.*

4. Had I concluded that the letter by Defendant Stern (Plaintiff's Exhibit 14) constituted an offer, capable of acceptance to convert it to a contract, and had I concluded that it was accepted, that still would not make it an enforceable contract under the Statute of Frauds,

§32-3-10, S.C. Code of Laws, 1976, in that the letter (Plaintiff's Exhibit 14) is not signed by Defendant Dempster and there has been no showing that Defendant Stern, or anyone else, was by Defendant Dempster lawfully authorized to make such a proposal. Indeed, on the face of the letter itself, Defendant Stern's letter (Plaintiff's Exhibit 14), expresses the caveat that the minimum parameters therein described had not been considered by Defendant Dempster, which makes it expressly clear to this Court, and should have made it expressly clear to Plaintiff, that Plaintiff's Exhibit 14 did not bind Defendant Dempster.

5. Had I considered Plaintiff's Exhibit 14 to be an offer, capable of acceptance to convert it into a contract, there was no acceptance thereof, and therefore no contract was formed, in that Plaintiff contends that Plaintiff's Exhibit 21, his proposed contract telefaxed to the defendants on the late afternoon of March 24, 1989 does not accept even the minimum parameters outlined in Plaintiff's Exhibit 14, but rather, varies, modifies, contradicts, and adds to those parameters. It is elementary, requiring no citation of authority, that such a purported "acceptance" is not cognizable at law as an acceptance, but at most, is a mere counter-offer.

6. There has been no showing to me that the Plaintiff in this case has ever had a contract with the Defendants for the sale and purchase of the lot in question in this case.

7. When Plaintiff filed of record and published his Notice of Lis Pendens in April of 1989, there was no basis in law or in fact, upon which the Plaintiff, in reasonable, good faith belief could assert that he held a contract for

the purchase and sale of the subject real estate or that he had any interest in the title thereto.

8. The Plaintiff's contract claim is utterly without merit.

9. Turning now to the counter-claims of the Defendants, I will first address the claim for slander of title.

While there is substantial case authority from around the nation, and substantial commentary provided by various treatises, there is virtually no authority in the State of South Carolina concerning the existence and/or elements of a cause of action for slander of title. However, from a study of the cases, it appears that our appellate courts in South Carolina have twice addressed cases involving claims of slander of title and they have not yet pronounced that the cause of action does not exist in South Carolina. However, our Courts have, also, not yet announced the elements and scope of recoverable damages of such a cause of action for slander of title, in South Carolina. In the earlier of these two reported South Carolina cases, the Supreme Court of South Carolina mentioned a counter-claim for slander of title in its reversal of the trial court's compulsory order of reference. The Court, however, merely stated that " . . . the real relief obtainable, if any, is . . . damages under the allegations of the counter-claims of trespass and slander of title. The appellants and respondent . . . are entitled to submit these legal issues to a jury," *Fuller v. Hemby*, 274 S.C. 459, 265 S.E.2d 36, 37 (1980). In the latter of these two cases, the Plaintiff sued for an injunction and damages for an alleged trespass by the cutting of timber. The Defendant contested and claimed title and plead, by way of counter-

claim, a cause of action for slander of title. Summary Judgment Motion was made, and hearing had, in which the trial judge granted the Plaintiff partial Summary Judgment, ruling that Plaintiff held record fee simple title to the land from which the timber had been cut. Consistent with his ruling that the Plaintiff held record fee simple title to the land in question, the trial judge granted judgment to the Plaintiff as to the Defendants' counter-claim for slander of title. The Defendants conceded, on appeal, that their counter-claim must fail if the trial judge's ruling on the matter of record title were to be sustained. The Supreme Court sustained the trial judge's ruling on the matter of record title and, therefore, upheld the trial judge's decision in dismissing the slander of title counter-claim. *Champion International Corporation v. Eubanks,* 291 S.C. 395, 353 S.E.2d 880, 881 (1987).

10. In addition, South Carolina is a Common Law State and my review indicates that we have no statutes which create, modify or abrogate the common law of this State, insofar as a claim for slander of title arises, or may arise, from the common law. South Carolina Code of Laws (1976), § 14-1-50. English Common Law ordinarily is presumed to govern if there is no South Carolina authority to the contrary; South Carolina courts are not bound by every decision made by the courts of England, but the reasons must be very strong for departing from English Common Law if there is no South Carolina authority on a particular point. *State ex rel. McLeod v Sloan Construction Co., Inc.,* 284 S.C. 491, 328 S.E.2d 84 (1985, S.C. App.).

11. According to Professors Prosser and Keeton, a considerable body of law has grown up about the subject

of interference with commercial or economic relations, and that this is, on the whole, a comparatively recent development, except in one respect. That one exceptional respect is said by Professors Prosser and Keeton to be very old, and that is in respect to those kinds of interference with commercial or economic relations by falsehoods, which are not personally defamatory and yet cause pecuniary loss. In respect to those kinds of facts, as Professors Prosser and Keeton have reported, there has been an "ancient, left-handed association with defamation . . . (which) has for some centuries been regarded as a more or less distinct tort in itself." *Prosser and Keeton on Torts,* 5th Ed. (Student edition 1984), § 128 at p. 962.

This tort is described by Professors Prosser and Keeton as "injurious falsehood," *Id.;* it is described in Corpus Juris Secundum under the heading "Slander of Property or Title and Injurious Falsehood," and it is described in American Jurisprudence 2d under the title "Slander or Disparagement of Title or Property." 53 CJS, Libel and Slander § 204; 50 AmJur 2d, Libel and Slander § 539.

12. Again, citing from Prosser and Keeton on Torts, the earliest cases in English law apparently arose shortly before the year 1600 and involved oral aspersions cast upon the Plaintiff's ownership of land by which he was prevented from leasing or selling it and from this the tort acquired the name of "Slander of Title." *Prosser and Keeton on Torts, supra;* (cases and authorities cited at p. 962, notes 3 and 4.)

13. In further explanation, Professors Prosser and Keeton have noted,

> [t]he Plaintiff's title or property seems to have been regarded as somehow personified, and so defamed. Because of the unfortunate association with "slander" a supposed analogy to defamation has hung over the tort like a fog, and has had great influence upon its development. On the other hand, the action seems to have been recognized from the beginning as only loosely allied to defamation, and to be rather an action on the case for the special damage resulting from the defendant's interference. In the 19th Century it was enlarged by slow degrees, first to include *written* aspersions and title to property other than land, and then to cover disparagement of the quality of the property, rather than its title and many contemporary cases concern aspersions cast upon a commercial product or even on a business operation itself. The tort is thus called by various names such as "disparagement of property," "slander of goods," "commercial disparagement," and "trade libel." As a matter of fact, subsequent decisions have shown that the tort is broader in its scope that [sic] any of these terms would indicate. *Id.*, at pp. 962-963.

In the earliest English case reviewed by Professors Prosser and Keeton, was reported in 1588, *Gerrard v. Dickinson*, 1588, Crow. Eliz. 196, 78 Eng. Rep. 452.

This tort, slander of title or injurious falsehood, is defined as follows:

> "Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the Plaintiff's title to his property, or its quality, or to his business in general, or even to some element of his personal affairs, of a kind calculated to prevent others from dealing with

> him, or otherwise to interfere with his relations with others to his disadvantage.
>
> The Plaintiff must prove special damages in the form of pecuniary loss, and this necessarily requires that the falsehood be communicated to a third person since the tort consists of an interference with the relationship. The communication must play a material and substantial part in inducing others not to deal with the Plaintiff with the result that special damage in the form of a loss of trade or other dealings, is established."
>
> *Prosser and Keeton on Torts, supra,* § 128, pp. 967.

This rule, requiring the Plaintiff to prove special damages as an essential part of his case of action for slander of title or injurious falsehood requires a party to establish pecuniary loss which has been realized or liquidated, as in the case of specific lost sales, *Prosser and Keeton on Torts, supra,* § 128, page 970-971, such as the Defendants' loss of the June 1, 1989 sale to Mr. English.

14. I conclude that the action for slander of title existed at common law, and continues to exist in South Carolina.

15. We turn now to the question of whether or not an action for slander of title arises from the filing and publication of a Notice of Lis Pendens. Clearly, there is no case law on that point in South Carolina. The issue has been addressed, however, in numerous other jurisdictions. Cases on this question are collected in an annotation, *Recording of Instrument Purporting to Affect Title as Slander of Title,* 39 ALR 2d 840-861. The authorities from

around the nation are split on the answer to that question. *Id.;* 50 AmJur 2d *Libel and Slander* § 541, pp. 1060-1061, 53 CJS *Libel and Slander,* § 211, p. 307.

16. Cases recognizing the applicability of the cause of action of slander of title arising from the wrongful filing for record of a lis pendens include the following: *Salstrom v Starke,* 670 P.2d 809 (Colo. App. 1983); *Weems v Moise,* 3 La. App. 224 (1925); *Sellars v Grant,* 196 F.2d 677 (CA5, Miss., 1952); *Atkinson v Fundaro,* 400 S.2d 1324 (Fla. App. D4. 1981); *Loren v Bank of Marion,* 618 F. Supp. 317 (W.D. Va., 1985); and *Kensington Development v Israel,* 142 Wis. 2d 894, 419 N.W.2d 241 (1988).

17. In several other states, however, the filing of the lis pendens is held not to sustain an action for slander of title, since, it is, there, specifically authorized by statute as a republication of a pleading, and is, therefore, absolutely privileged as a part of a judicial proceeding. See *e.g., Stewart v Fahey,* 14 Ariz. App. 149, 481 P.2d 519 (1971).

18. In other jurisdictions, the filing of a lis pendens notice is held to be qualifiedly privileged. See cases collected, 53 CJS *Libel and Slander* § 211, p. 307. Here, Plaintiff does not raise the defense of absolute or qualified privilege in his reply to the counterclaim and, therefore, has waived it, if it be held to exist as a defense in South Carolina.[1]

---

[1] If a qualified privilege exists under the law in South Carolina in a slander of title action, here in this case the privilege was so abused as to provide no defense to the plaintiff.

19. Plaintiff having failed to bring his lawyers to testify at trial (see Finding of Fact 21), Defendants are entitled to the benefit of a presumption that, had they been called, the testimony of those lawyers would have been adverse to Plaintiff. See VI *Wigmore on Evidence (Chadbourne Revision)*, § 1778, as cited in *Sanders v Worthington*, ___ Tex. ___, 382 SW2d 910, 916 (1964).

20. The clear inference to be drawn from all of this is that Plaintiff, by his Notice of Lis Pendens, intended to delay the sale to Mr. English until the time pressure brought either Mr. English or Defendants Stern and Dempster, with hat(s) in hand, meekly to the Burgess bargaining table. This strategy is malicious and unfair, and overcomes any privilege.

21. Some cases, from around the nation, have recognized that "the recording of an unfounded claim is actionable only when the Defendant's act is malicious, that is where it is done from improper motives or without reasonable belief in the efficacy of the claim." See Annotation: *Recording of Instrument Purporting to Affect Title as Slander of Title*, 39 ALR 2d 840, 842.

22. I conclude that the better rule for South Carolina is that the act of wrongfully filing and publishing a Notice of Lis Pendens, either from improper motives, or without reasonable belief in the efficacy of the claim where malice is shown, is actionable as slander of title, overcoming any privilege defense, if alleged, and I so hold that to be the law applicable in this case. I conclude that Plaintiff's conduct in filing and publishing his Notice of Lis Pendens was a malicious act, proceeding from improper motives on the part of the Plaintiff, where the

Plaintiff had no reasonable belief in the efficacy in his claim, and that the utterance and publication of the Plaintiff that he held a contract to purchase the Defendants' lot was a falsehood which was communicated to Mr. English, interfering with the relationship between Mr. English and the Defendants and was more than even a mere material and substantial component inducing Mr. English not to purchase, on June 1, 1989, the Defendants' lot, but was the sole operative reason which induced Mr. English not to purchase, on June 1, 1989, the Defendants' lot. I also conclude that these events resulted in special damage to the Defendants in the form of the loss of the benefits to them of the contracted-transaction with Mr. English, in the loss of the purchase price and the interest thereon, and the continued/ownership cost of the property, as well as the expenditure of money and the incurring of obligations for the payment of attorneys' fees and costs, including travel costs, required of the Defendants' by reason of this law suit, instituted by the Plaintiff, in order to discharge the Notice of Lis Pendens and to seek to make the Defendants whole from the damages they have suffered at the hands of this Plaintiff. Thus, I conclude that the Defendants have made out their case against the Plaintiff for slander of title.

23. There is a split of authority in this country as to whether or not proof of attorney's fees and costs constitute special damages which may be proven in a slander of title action or a claim for injurious falsehood. 53 C.J.S. Libel and Slander § 210, p. 306. Cases allowing proof and recovery of such attorney's fees include: *Fountain vs. Mojo*, 687 P.2d 496 (Col. App., 1984); *Donald M. Paterson, Inc. vs. Bonda*, 425 S.2d, 206 (Fla. App. D.4, 1983); *Rayl vs.*

Shull Enterprises, Inc., 108 Id. 524, 700 P.2d 567(1984); *Den-Gar Enterprises vs. Romar*, 94 N.M. 425, 611 P.2d 1119 (1984), cert.den. 94 N.M. 628, 614 P.2d 545 (1980); *Walmsley vs. Robertson*, Man Unrep. Cas. 162 (La. 1877-80), as cited in 50 AmJur 2d *Libel and Slander* § 550, pg. 1068-1069, at note 7; *Olsen vs. Kidman*, 120 Ut. 443, 235 P.2d 510 (1951); *Glusman vs. Liberman*, 285 S.2d 29 (1973) Fla. App.D4); *Bloom vs. Weiser*, 348 S.2d 651 (1977 Fla. App. D.3) [See other such cases collected at 50 AmJur 2d *Libel and Slander* § 550, 1989 Supp.; See Annotation, *Special Damages in Slander of Title Action*, part B "Litigation and Related Expenses," 4 ALR 4th 532, 560, *et seq.*]

24. A few reported cases have disallowed recovery of attorneys fees and costs. *McGuinness vs. Hargiss*, 56 Wash. 162, 105 P.233 (1909); *American National Bank & Trust Co. v First Wisconsin Mortgage Trust*, 577 SW2d 312 (1979, Tex. Civ. App. Beaumont).

25. However, upon a showing of malice, such as I have found in the instant case, a Texas Court did allow recovery of attorneys fees, without requiring segregation of the fees applicable to the action to remove the cloud on the title from those applicable to the slander of title action, *Ellis vs. Waldros*, 627 SW2d 791 (1982 Tex. App. D.2); *accord*, R.2d (Torts) § 632, § 633, comment h.

26. I conclude that the greater weight of authority and, certainly the greater weight of reason and fairness, favors inclusion of attorney's fees as special damages in the slander of title/injurious falsehood action, particularly where malice, improper motives or the absence of reasonable belief in the efficacy of one's claim, occurs in

the filing of one's Notice of Lis Pendens and the publishing of same.[2]

27. The Defendants are entitled to the recovery of punitive damages on this Slander of Title claim. *Gudger v Manton*, 21 Cal.2d 537, 134 P.2 217 (1943); *Lacroix v Villia*, 123 La. 459, 49 S. 20 (1909); *Greenlake Investment Co. v Swartout*, 161 S.W.2d 697 (1942, Mo. App.); *Winn v Warner*, 199 S.W.2d 560 (1947, Tex. Civ. App.).

28. I conclude and hold that where, as here, punitive damages are appropriate, the amount of recoverable attorneys' fees in the pending litigation may be considered, *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 318 Md. 337, 586 A.2d 35 (1990), under the "punishment rationale" to punish wrongful conduct, where a party has acted in bad faith, vexatiously, wantonly or oppressively, rather than under any concept of mere "compensatory damage." *Id.*[3]

---

[2] If not properly allowed under the principles listed above, then under the principle announced in *Bowen & Smoot vs Glenn H. Plumlee, et al*, South Carolina Advance Sheets, April 7, 1990, attorney's fees should be allowed. There are in the nature of sanctions.

[3] "The highest courts of seventeen states have considered whether to permit a jury calculating an award of punitive damages to take into account the amount of reasonable attorneys' fees incurred in the pending litigation. Nine states regularly allow jury consideration of attorneys' fees on the issue of punitive damages. Two states require evidence sufficient to sustain an award of punitive damage as a threshold condition: once met, an award of attorneys' fees may be awarded as an additional compensatory or special damage item. Six states deny jury consideration of reasonable attorney's fees on this issue of punitive damages altogether. Thus, the majority of states to

29. We turn now to the Defendants' counter-claim against the Plaintiff for intentional, or tortious, interference with contract, wherein the Defendants claim that the conduct of the Plaintiff, in filing and publishing the Notice of Lis Pendens, was a wrongful and intentional interference with the contract of the Defendants with Mr. English. No case has come to my attention holding that such a cause of action is not predicable on the filing and publishing of a Notice of Lis Pendens. The elements of such a cause of action are well-known in South Carolina: the claimant must establish the existence of the contract, the wrongdoer's intentional procurement of the breach of the contract, the lack of justification on the part of the wrong-doer for so doing, and resulting damage to the claimant. *DeBerry v. McCain*, 275 S.C. 569, 274 S.E. 2d 293 (1981); *Threlkeld v. Christoph*, 280 S.C. 225, 312 S.E. 2d 14, 16 (1984); *Todd v. South Carolina Farm Bureau Mutual Insurance Company*, 283 S.C. 155, 321 S.E. 2d 602, writ gr. in part, 285 S.C. 84, 328 S.E. 2d 479, quashed 287 S.C. 190, 336 S.E. 2d 472 (1985); *Collins Music Company, Inc. v. Ingram*, 292 S.C. 537, 357 S.E. 2d 484 (1987); *Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc.*, 294 S.C. 169, 363 S.E. 2d 390, 394 (1987).

30. Here, the Defendants have established that they had a contract with Mr. English (Defendants' Exhibit 1 and 2 and Plaintiff's Exhibit 37); that no later than March

---

consider the issue, permit the jury to take into account the amount of reasonable attorney's fees incurred in the pending litigation when calculating a punitive damage award." *St. Luke Evangelical Lutheran Church, Inc. v. Smith, Id.*

27, 1989, the Plaintiff had acknowledged, in a *res gestae*[4] manner, or as an admission against his own interest,[5] that he knew of the contract between Mr. English and the Defendants; that the Plaintiff, in filing the Notice of Lis Pendens on April 6, 1989, intended to "tie up" the Defendants and Mr. English, intentionally procuring the breach of their contract when the Defendants were not able to close on June 1, 1989 and give the contracted-quality of title to Mr. English; that the Plaintiff was unjustified in filing the Notice of Lis Pendens, because he had, despite his assertion to the contrary, no contract cognizable at law with the Defendants to purchase the subject lot, and he knew that; and that the Defendants, as a result, have suffered damages at least in the loss of interest, and the continued carrying/ownership cost for the lot for at least another year. I take note that the Defendants concede that the case law does not entitle them to recover attorney's fees and court costs, as special or compensatory damages, in a claim for intentional, or tortious, interference with contract.

31. I find that the special damages proved by the Defendants at trial under both counterclaims (Slander of Title and Intentional Interference with Contract) to have resulted from Plaintiff's conduct, as above-described, are as follows:

---

[4] *Powers v Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967).

[5] *Todd v South Carolina Farm Bureau Mut. Ins. Co.*, (1984) *supra*, at p. 614; *R.E. Allen Bro. & Co. v Burnett*, 92 S.C. 95, 755 S.E. 358 (1912).

I. Lost Interest Calculation on Stern and Dempster Sale to English:

Cash Portion of Price	$385,000.00
Food Lion Limited Partnership	28,000.00
Total Purchase Price	$413,000.00
Owner-Financed	(341,500.00)
Balance of Price	$ 71,500.00

$341,500.00 @ 10½% interest (June 1, 1989 to March 1, 1990) – per contract – $26,893.12 – per diem – $99.60 to Entry of Judgment

$71,500.00 @ 8¾ interest: (June 1, 1989 to March 1, 1990) per statute – $ 4,692.19 – per diem – $517.38 to Entry of Judgment

Lost Interest to March 1, 1990 $ 31,585.31

(Trial Date)

II. Port Royal Plantation Annual Assessments:

$497.00 per year – pro-rated (June 1, 1989 to March 1, 1990) – $371.28 – $1.36 per diem To Entry of Judgment

III. Beaufort County Ad Valorem Taxes:

$5,000.00 per year- pro-rated (June 1, 1989 to March 1, 1990) – $ 3,740.10 – $13.70 per diem to Entry of Judgment

SUMMARY
to March 1, 1990

I.	Interest	$31,585.31
II.	POA Assessments	371.28
III.	Taxes	3,740.10
	TOTAL	$35,696.69[6]

32. In addition, I conclude, for reasons outlined above in Conclusions of Law 23, 24, 25, and 26 that, under the slander of title cause of action, Defendants are entitled to recover from the Plaintiff, as special damages, the Defendants' attorneys' fees and costs. Thus, consistent with the understanding reached with the attorneys in this matter during the trial of the case, I am now entering this Order and will set up a hearing on the question of the amount of attorney's fees and costs which I will allow, as special damages. In addition, I will decide the amount of punitive damages to be assessed against the Plaintiff, after which I will issue my Final Order and Judgment in this case and final judgment will be thereupon entered.

---

[6] I award, here, no damages to Defendants in respect to the amount of purchase price of the contracted English – Stern/Dempster transaction, except, interest thereon, in view of Mr. English's testimony that it was still (on February 28, 1990, Court Exhibit 2) his intention to close on the property and that the down payment is still in escrow. However, if Mr. English does not close within sixty (60) days after the issuance of the Final Order and Judgment in this matter (hereinafter discussed), I will allow Defendants to reopen the case to assess damages, based on such after-discovered evidence showing Mr. English has chosen not to close.

Hence, I regard, that the appeal rights of the parties will not commence until the entry of the Final Order and Judgment, after the attorney's fees/costs and punitive damages hearing.

WHEREFORE, it is hereby ORDERED that a further hearing of this matter will be held by me in my Chambers/Courtroom at 1407 King Street, Beaufort, South Carolina, at 12:00 o'clock PM, on the 20th day of August, 1990, for the purpose of determining the amount of attorney's fees and costs of, and recoverable by, the Defendants from the Plaintiff, for the information of the Court in making and issuing its Final Order and Judgment.

AND IT IS SO ORDERED.

/s/ Thomas Kemmerlin Jr.
Thomas Kemmerlin, Jr.,
Master-in-Equity/Acting Circuit Judge

Beaufort, South Carolina
August 13, 1990

APPENDIX 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 89-CP-07-750
PAUL W. BURGESS, Plaintiff,	)	
vs.	)	ORDER
DANIEL STERN and JOHN J. DEMPSTER, d/b/a DANIEL STERN AND ASSOCIATES, Defendants.	)	

I tried the captioned case on March 1 and 2, 1990. On August 13, 1990 I handed down my Order in which I denied the plaintiff's claim for specific performance and awarded the defendants damages on their counterclaim for slander of title, which damages included attorney's fees. On October 24, 1990 I heard the plaintiff's motion to have me reconsider my Order of August 13, 1990, but I denied this motion. Now I am faced with a number of motions made by the plaintiff, the first to be taken up being:

> 1. Plaintiff has this date made motion inter alia to reopen this case. Based upon the facts stated in said motion, plaintiff moves to disqualify Judge Thomas Kemmerlin, Jr. from hearing this case on the grounds that he has violated his

obligations as a judge through *ex parte* contact with defendant's counsel in this action.

2. Plaintiff's rights have been unfairly, improperly, and substantially prejudiced by Judge Kemmerlin's conduct.

3. The information upon which this motion is based was unavailable to plaintiff until after Order of August 13, 1990.

The basis for this motion is that I engaged in *ex parte* discussions when I gave instructions to Barry L. Johnson, Esquire, the defendants' attorney, to draw an Order in favor of his clients and discussed such Order with him without revealing to the plaintiff's attorney such instructions and discussions. Certainly I did give Mr. Johnson instructions to draw the Order, and I had discussions with him as to how the Order was to be drawn.

During the years that I practiced law (1953-1986) I was frequently asked by circuit and county judges, special referees and Masters in Equity to prepare Orders in my clients' favor. Opposing counsel were never informed of this. The judge merely signed and filed the Order and gave notice of the filing to the attorneys on both sides. Since I became Master I followed this same practice until, shortly after I decided this case, I came across[1] Opinion No. 2-1988 of the Advisory Committee on Standards of Judicial Conduct dated January 4, 1988 which clearly says that to advise an attorney to draft an Order is an *ex parte*

---

[1] I cannot remember who brought it to my attention; I think it just appeared on my desk, perhaps by some kind lawyer who wanted to point out without telling me face-to-face that I was doing something wrong.

communication unless done in the presence of attorneys on the other side of the case. From the time I read the Opinion I have not violated it.

Ignorance of the law is no excuse, so I am guilty of unethical conduct and, as charged, I have violated my obligations as a judge.

Counsel for the plaintiff points out to me that the January 4, 1988 Opinion of the Advisory Committee on Standards of Judicial Conduct which I have violated is based upon *In Re Wisconsin Steel Corp.*, 48 B.R. 753 (D.C. 1985) and the follow up *In Re Charles B. McCormick,*[2] No. 85-7-272-10, being an unreported determination of the Chief Judge of the 7th Circuit. He also points out the conduct of the judge there, "not unsimilar to this case", [3] resulted in the trial judge receiving a public reprimand. The inference is not wasted on me.

The thought naturally occurs to me that if I do not recuse myself, I run the risk of a reported case reprimanding me being read by law students (including perhaps my grand-nephew and name sake, Thomas Kemmerlin Mize, now age five (5)) through all eternity. This is enough to tempt me like Gallileo to recant, that is, to sign an Order recusing myself which probably would result in the granting of a new trial, all of which probably could make the matter go away, so that in time I would forget this nightmare and the Reporters not be stained with my name. But this thought is an evil one which I resist because it makes a new trial necessary in this

---

[2] The trial judge in *In Re Wisconsin Steel Corp., Supra*

[3] Transcript of motion hearing of July 10, 1991, p. 15.

litigation which like all litigation should finally come to an end, and because the second accusation against me is that, "plaintiff's rights have been unfairly, improperly, and substantially prejudiced by Judge Kemmerlin's conduct," and this simply is not true.

While I do not deny the improper *ex parte* communication, I think it appropriate to view the fruits of that improper communication. If in fact it did not affect what I did and the rulings which I made, then I see no reason to recuse myself. The situation here is analagous to the drunk driver who goes through an intersection on a green light and is struck by a sober man who ran the red light. The drunk is a bad guy, but he has caused no harm. My shoulders are broad enough to take the lashes for being the bad guy as long as I haven't done anything wrong and have not hurt anyone else.

The plaintiff's complaint gives me no problem. Several months before the trial ever started I heard motions in the case and advised Mr. Clabaugh that he had statute of frauds and parol evidence problems, and I feel I correctly ruled against him on his complaint and told Barry Johnson how to prepare the Order. Barry basically followed my instructions, and I regard that part of the Order as clearly being mine, and I have no apologies except for being guilty of an *ex parte* communication. Actually I seem to recall that I told Mr. Clabaugh he had lost on that portion of the case.[4]

Many years ago when I practiced law in Columbia, South Carolina, under somewhat similar facts, I brought a

---

[4] I don't have a transcript before me.

suit for slander of title based upon an improper filing of a lis pendens. The case came before Judge Donald A. Fanning, then sitting as a Circuit Court Judge by Order of Chief Justice Woodrow Lewis. I remember from my research then that it was an open question as to whether or not such a cause of action existed in South Carolina or not and, if it did exist, the court was going to have to decide whether attorney's fees would be a proper element of damages, that is, there were two views in the country on the attorney's fees subject. Judge Fanning ruled against me saying the cause of action does not exist in South Carolina, and I was convinced he was wrong and served a notice of intent to appeal, but abandoned it because the size of the case did not justify the expense of an appeal. I carried that background into the trial of this case.

My recollection is that I at some point in time told Barry L. Johnson, the defendants' attorney, to prepare me an Order against the plaintiff on his complaint, but at that time I was still considering how I was going to rule on the counterclaims. I remember that the law was not then clear to me because I remember my experience related above concerning the case I had before Judge Fanning. I studied briefs submitted by the parties on these counterclaims, did some independent research, and tending to lean toward awards on these counterclaims, I told Mr. Johnson to prepare the Order now to include a ruling in his favor on the counterclaims. This he did, and I considered it for some time. When I became convinced that the ruling was correct on the counterclaims, I signed the Order Mr. Johnson had already sent me, filed it, and mailed copies to the attorneys.

My recollection as to the conversations between me and Mr. Johnson are as to the form of the Order and what I thought it should include. When one considers the magnitude of the transcript and the complex issues, the amount of time it took me to tell Mr. Johnson how to draw the Order and how to review it, the. amount of time on his time slips is not really so much.[5]

Of this I am certain: All factual determinations were by me. Mr. Johnson had no input on the facts. At this point in my recollection I see only a technical violation in the *ex parte* communication. All decisions on the law and the facts were mine. Mr. Johnson merely pushed the pencil.

The only thing that gives me concern is the recollection of Mr. Johnson that he brought me a Maryland case. I seem to remember this: It had no impact on me as I recall and at most if it helped persuade me to adopt the wrong view of attorney's fees in South Carolina, this is an error of law which the Court of Appeals or the Supreme Court can correct on appeal without a new trial.

The second of the plaintiff's motions is to reopen the case, vacate previous Orders and grant a new trial upon the grounds:[6]

> 2. The basis for this motion is that plaintiff has been improperly prejudiced and denied due

---

[5] It was these time slips furnished to the plaintiff's attorney in connection with the defendants' claim for attorney's fees which alerted the plaintiff to my improper *ex parte* communication.

[6] The quotation is from the motion.

process of law by virtue of the extensive, and improper *ex parte* contacts between Judge Thomas Kemmerlin, Jr., and counsel for the defendants in this case in the preparation of the Order of August 13, 1990.

3. At a minimum there were *ex parte* contacts between the Judge and Mr. Barry Johnson, counsel for defendant Daniel Stern and Associates, beginning in March of 1990 with a conference and phone call between Mr. Johnson and Judge Kemmerlin wherein Mr. Johnson learned that Judge Kemmerlin was going to rule for his client. At least one other conference between the two was held in May of 1990. Mr. Johnson and Judge Kemmerlin had another *ex parte* telephone conversation in May, to discuss the proposed Order. In June of 1990, after drafting portions of the Order, Mr. Johnson conferred by telephone with defendant Daniel Stern about it. Later, Mr. Johnson redrafted part of the Order. Mr. Johnson then finalized his draft copy of the draft to Judge Kemmerlin. Thereafter, Mr. Johnson traveled to Beaufort again and conferred *ex parte* with Judge Kemmerlin about the Order. Another *ex parte* conference regarding the proposed Order was held in July. (All events are cited from billing statement of counsel for defendants, Exhibit A).

4. The evidence in paragraph 3 was obtained after the Order of August 13, 1990 was issued and is in fact after-acquired.

5. The Order of August 13, 1990 is the result of a trial judge not properly performing his duty, as demonstrated by his turning over the functioning of his judicial offices to one of the parties before him without notice to the other side.

6. The actions of the Judge in this case have allowed Mr. Johnson to insert into the Order his own findings and conclusions and the findings and conclusions of his client.

7. The actions of the Judge have allowed Mr. Johnson to have an unfair advantage not only in formulating his own Order but in conducting settlement negotiations with the knowledge he had won and with the ability to write his own Order.

8. The facts as presented herein as will be presented to the court at the hearing of this motion show a total failure of the judicial process so as to require the vacating of all Orders and a new trial.

The answer to this has been given above. No "evidence" was given in the *ex parte* communications; they were concerned with how the Order was to be drawn. The Order was still mine, not Mr. Johnson's. Again, he merely pushed the pencil.

A third motion was filed to require Mr. Barry L. Johnson from further participation. An Order has already been filed making that issue moot. Mr. Johnson is no longer an attorney in the case.

A fourth motion was made by the plaintiff, its purpose being to stay further proceedings until the other three motions were heard.

To recapitulate, in the event the rulings are not clear: I refuse to disqualify myself; I refuse to reopen the case; I refuse to vacate my previous Orders; and I refuse to grant a new trial; Barry L. Johnson is no longer participating in

this case; and in effect the proceedings have been stayed while I ruled on these motions.[7]

I still have before me to be heard several motions made by the plaintiff and testimony to be taken on additional damages. All of this I will do on September 23, 1991, at 1:30 p.m.

AND IT IS SO ORDERED.

/s/ Thomas Kemmerlin, Jr.
THOMAS KEMMERLIN, JR.
MASTER IN EQUITY and
SPECIAL
CIRCUIT COURT JUDGE,
BEAUFORT
COUNTY COMMON PLEAS

Beaufort, South Carolina.

September 5, 1991

---

[7] While the motions were argued on July 10, 1991, I did not get a transcript of the motions hearing until August 16, 1991

APPENDIX 4

(seal)

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, SC 29211
PHONE NO. 734-1080

May 5, 1993

A. Camden Lewis, Esquire
Mark W. Hardee, Esquire
P. O. Box 11208
Columbia, S. C. 29211

Re: Paul W. Burgess v. Daniel Stern, et al.

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/David W. Harwell C.J.
s/A. Lee Chandler A.J.
s/Ernest A. Finney, Jr. A.J.
s/Jean H. Toal A.J.
s/James E. Moore A.J.

May 5, 1993."

The remittitur in this matter is today being forwarded to the Clerk of Court for Beaufort County.

Very truly yours,

/s/ Brenda F. Shealy
DEPUTY CLERK

BFS/dmh

cc: Morris D. Rosen, Esquire
Russell P. Patterson, Esquire
Susan Taylor Wall, Esquire

APPENDIX 5

IN ACCOUNT WITH

LAW OFFICES

NOVIT, SCARMINACH & JOHNSON, P.A.

ATTORNEYS AT LAW

POST OFFICE DRAWER 14

HILTON HEAD ISLAND, SOUTH CAROLINA 29938
TELEPHONE(803) 785-5850

Daniel Stern & Associates
Suite 240, The Medical Center
211 N. Whitfield Street
Pittsburg, PA 15206

STATEMENT # 17116

FOR PROFESSIONAL SERVICES RENDERED

RE: 1090-3

Contract with R. English/(Paul Burgess)

IN CONNECTION W/ABOVE REFERENCED MATTER

MAR 16 90	BLJ	Received and reviewed copy of Burgess' brief on slander of title, etc., call to Mr. Clabaugh re: same; drafted and prepared letter to Judge Kemmerlin re: same. 1.20

* * *

MAR 19 90	BLJ	Directed M. Lund in computer-assisted legal research re: copy of 1990

	Md. Ct./ Appeal Case, St. Luke Evangelical Lutheran Church, Inc. v. Smith, on relationship of attorneys fees to punitive damages in a defamation action; drafted and prepared letter to Judge Kemmerlin re: same.
Mar 20 90 BLJ	Obtained and studied copy of Md. opinion filed 1/16/90 on attorneys fees/punitive damages; traveled to Beaufort and obtained transcript of trial from Judge Kemmerlin and gave him Md. Opinion, 3/19/90 returned call to Judge Kemmerlin re: drafting of Order in case (travel pro-rated). 2.90
MAY 06 90 BLJ	Further studied Trial Transcript and drafted and prepared memo, abstracting factual and legal points from most of Vol. I of trial transcript. 3.00
	* * *
MAY 08 90 BLJ	Returned telephone call to Mr. Clabaugh's Office; conference with Judge Kemmerlin re: possible Order in Case. .30
	* * *
MAY 25 90 BLJ	Telephone call from Judge Kemmerlin re: proposed Order. .10

JUNE 04 90 BLJ continued review of testimony in remainder of Vol. 1 of Trial Transcript to completion; began review of testimony in Vol. II of Trial Transcript to page 50 thereof; drafted and prepared memo re: same. 1.60

JUNE 06 90 BLJ Drafted and prepared first draft of remainder of analysis of trial transcript. 4.40

JUNE 08 90 BLJ Drafted and prepared first draft of proposed trial order. 5.00

JUNE 11 90 BLJ Further drafted, edited and revised Findings of Fact portion or proposed trial Order. (.90); learned of mechanical problem with equipment (no charge). .90

JUNE 11 90 BLJ Returned telephone call to Mr. Stern re: status of Order; drafted and prepared letter to Mr. Stern re: same. .30

JUNE 12 90 BLJ Further edited and re-drafted proposed Findings of Fact. .60

JUNE 12 90 BLJ re-drafted and prepared Conclusions of Law portion of proposed Trial Order, due to equipment failure. (no charge) 1.40

JUNE 13 90 BLJ Further Legal Research, editing and redrafting of proposed Order 6.50

JUNE 13, 90 MHL	Conference with B. Johnson re: Proposed Order; reviewed proposed Order; researched on VaraLex. 1.90
JUNE 14 90 BLJ	Further edited and re-drafted proposed Order. 4.20
JUNE 15 90 BLJ	Finalized draft of proposed Order; drafted and prepared letter to clients, sending them a copy of same; call to Beaufort, and delivered copy thereof to Judge Kemmerlin; returned to Hilton Head (travel pro-rated). 3.25
JUNE 27 90 BLJ	Travelled to Beaufort; conferred with Judge Kemmerlin re: status of matter; returned travel to Hilton Head. (travel pro-rated) 1.00
JULY 16 90 BLJ	Conference with Judge Kemmerlin re: status of proposed Order. .30

APPENDIX 6

STATE OF SOUTH CAROLINA	)	IN THE COURT
COUNTY OF BEAUFORT	)	OF COMMON PLEAS
PAUL W. BURGESS,	)	CASE NO. 89-CP-07-750
Plaintiff,	)	
vs.	)	AFFIDAVIT
DANIEL STERN and JOHN J. DEMPSTER, d/b/a DANIEL STERN and ASSOCIATES,	)	
Defendants.	)	

* * *

Hence, in due course, I filed our response to Plaintiff's pleadings, including counterclaims for tortious interference with a contract and for slander of title.

Upon motion made and granted, my pleadings were amended to include assertion of the affirmative defense of the statute of frauds.

6. Thereafter, the case proceeded rather uneventfully through trial. Trial occurred on March 1 and 2, 1990, as a non-jury matter before the Honorable Thomas Kemmerlin, Jr., Acting Circuit Judge and Master in Equity for Beaufort County. The Judge did not rule from the bench but indicated he would take the matter under advisement. Extensive briefs had been, and were, provided to the Court by both sides.

7. In the latter part of March, 1990, I learned of a Maryland Court opinion, useful on punitive damages,

and drafted a letter on that subject to Judge Kemmerlin with copy to counsel. I do not remember if it was mailed or not.

8. Also, in the latter part of March, 1990, I received a telephone call from Judge Kemmerlin concerning this case. He stated to me, in substance, that he had, pretty-well, made his mind up to deny and dismiss the case-in-chief of Mr. Burgess, but he reserved the right to change his mind and, in addition, he was not certain how he was going to rule on the Defendants' Counterclaims but, in any event, he directed me to pickup the typed transcript of trial, from his office, and to draft an Order for his review which would have only addressed the dismissal of the Plaintiff's case-in-chief.

9. I set about that task, going over to Beaufort and picking up the trial transcript from Judge Kemmerlin. At that time, I have an impression that I gave him a copy of the Maryland court opinion, I mentioned above, on attorneys fees. Thereafter, I discovered difficulties in complying with the direction of the Court, because of the extensive overlap of the facts, findings and legal issues between the case-in-chief and the counterclaims. I was also delayed in attempting to complete this task due to case work requirements in other files.

10. Before delivering the proposed Order to Judge Kemmerlin, I had several other contacts with him although I do not recall the sequence, in which I only apologized to him for not having been able to have yet completed the task. However, in one of those contacts, I mentioned to the Judge that I had difficulty drawing the Order pursuant to his directions and explained the

dilemma as set forth in Paragraph 8 above and asked him what to do. Thereupon, Judge Kemmerlin directed me to draft the proposed Order, still to deny the case-in-chief of the Plaintiff, but also to grant the counterclaims of the Defendants. The Judge however said that he still did not know how he was going to rule on the case. When I saw the Judge in mid-June, 1990, to deliver the proposed Order, he told me that he still did not know what he was going to do and we had no substantive discussion about the case.

11. My statements to my clients show that I contacted Judge Kemmerlin twice thereafter, but I do not recall those contacts. At most, they were reminders to him that the parties needed an Order issued. To the best of my recollection, the next time, after June 15, 1990, that I heard from Judge Kemmerlin about this matter was when I received in the mail a signed Order from him dated August 13, 1990. The Order as thus signed consisted of 27 pages. Judge Kemmerlin simultaneously sent copies of the signed Order to Mr. Clabaugh and me, with the original going to the Clerk of Court for filing.

* * *

APPENDIX 7

In re Charles B. McCormick
No. 85-7-372-10, Unreported Determination
(Chief Judge of the 7th Cir. May 7, 1985)

Digest Fact Categories [31vb]

4. Engaging in *ex parte* discussions.

FACTS: On four occasions, United States Bankruptcy Judge McCormick requested, through his law clerk, that counsel for the debtor in a bankruptcy reorganization to prepare orders in the case. Each order represented considerable scholarship and was released as though written by Judge McCormick himself. Judge McCormick did not reveal to any counsel other than the debtor's how he planned to decide matters covered in the orders.

HOLDING: By directing his law clerk on four occasions to have counsel for the debtor in a bankruptcy reorganization prepare proposed orders in the debtor's favor without prior notice to the opposing counsel, Judge McCormick clearly violated Canons 1, 2, and 3A(4) of the Code of Judicial Conduct. If the judge announced his rulings in advance to both parties and then in the presence of both directed counsel for one of them to prepare orders carrying out his rulings, then there would have been no impropriety. The misconduct lay in depriving counsel opposing the debtor of the opportunity to object to the orders in advance. The knowledge that a judge will rule in a particular way is invaluable information to a

lawyer and a client, particularly when the other lawyers and their clients do not share in that information. The incident gave rise to the appearance of unprofessional conduct.

DISPOSITION: Written public censure in addition to an oral reprimand imposed. [Ed. note: Judge McCormick resigned as chief judge of the Bankruptcy Court for the Northern District of Illinois on the day that the reprimand and censure were issued.]

Copyright 1985 by the American Judicature Society.